No. 17-8151

IN THE

In the Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE. L. PRECYTHE, DIRECTOR, DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF SCHOLARS AND OF ACADEMICS OF CONSTITUTIONAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Bruce H. Schneider
Counsel of Record
David J. Kahne
Emily L. Kuznick
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038

Counsel for Amicus Curiae

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. STATES CANNOT TRUNCATE THE RIGHTS SECURED BY THE EIGHTH AMENDMENT BECAUSE OF LIMITS IMPOSED BY STATE LAW OR RESOURCES 5

A. THERE HAS BEEN A TROUBLING HISTORY OF CRUEL AND UNUSUAL LETHAL INJECTIONS. 6

B. IF STATES CAN PRE-DEFINE WHAT METHODS OF EXECUTION ARE "AVAILABLE," THEN ANY CRUELTY IS INSULATED FROM REVIEW. 10

II. THE EXPERIENCE OF COUNTRIES AROUND THE WORLD HELPS TO INFORM WHAT METHODS OF EXECUTION ARE "AVAILABLE" AND ILLUSTRATES HOW LETHAL INJECTION IS AN OUTLIER IN WORLD PRACTICE. 19

III. THE METHODS OF EXECUTION USED IN THE UNITED STATES FURTHER INFORM WHAT METHODS ARE "AVAILABLE" AND ILLUSTRATE A BROAD RANGE OF ALTERNATIVES 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

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(M.D. Ala. April 15, 2016) 13

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae[2] is comprised of legal scholars and academics ("*Amicus*") who have spent their careers studying and teaching United States constitutional law, including the death penalty and methods of execution, and many have written scholarly articles on these topics. The below listed members of *Amicus* respectfully submit this brief urging reversal of the decisions below.

The below listed members of *Amicus* are concerned and seek to apprise the Court of information regarding the "availability" of alternative methods of execution to be considered in clarifying the applicable Eighth Amendment standard for method-of-execution challenges.

- William W. Berry III, Associate Professor of Law, Frank Montague, Jr. Professor of Legal Studies and Professionalism, University of Mississippi School of Law, Robert C. Khayat Law Center;

- Dr. Christopher L. Blakesley, Professor Emeritus, UNLV & Louisiana State

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part and no person other than *Amicus Curiae*, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent to this filing have been filed with the Clerk of the Court.

[2] The views expressed by the members of *Amicus Curiae* are their own and not those of the institutions where they teach. The list of institutions to which members of *Amicus Curiae* belong is provided merely for identification purposes.

University (LSU), Barrick Distinguished Scholar, UNLV, William S. Boyd School of Law, University of Nevada Las Vegas;

- Kim D. Chanbonpin, Professor of Law, John Marshall Law School;
- Anthony M. Dillof, Associate Professor of Law, Wayne State University Law School;
- Jeffrey Fagan, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School;
- Marc Falkoff, Associate Dean for Academic Affairs & Professor of Law, Northern Illinois University College of Law;
- Brian Gallini, Senior Associate Dean for Research & Faculty Development, Professor of Law, Robert A. Leflar Law Center, University of Arkansas;
- Catherine M. Grosso, Associate Professor of Law, Michigan State University;
- Janet C. Hoeffel, Catherine D. Pierson Professor of Law, Tulane Law School;
- Daniel LaChance, Associate Professor of History, Andrew W. Mellon Faculty Fellow in Law and the Humanities, Emory University;
- Arnold H. Loewy, George Killam Professor of Criminal Law, Texas Tech School of Law;
- Joseph Margulies, Professor of Law and Government, Cornell University;

- Colin Miller, Associate Dean for Faculty Development, Professor of Law, School of Law, University of South Carolina;

- Justin Murray, Climenko Fellow and Lecturer on Law, Harvard Law School;

- Austin Sarat, Associate Dean of the Faculty, William Nelson Cromwell Professor Jurisprudence & Political Science, Director, Mellon Project on Student-Faculty Research, Amherst College; and

- Kenneth Williams, Professor of Law, South Texas College of Law.

SUMMARY OF ARGUMENT

One issue presented by this case is what this Court means in requiring that a capital prisoner challenging a method of execution propose a "feasible, readily implemented" alternative procedure. The courts below here and other lower courts have interpreted *Glossip* in an unduly restrictive reading of this requirement. This interpretation has led to the summary rejection of petitioners' proposed alternative methods of execution, either because the method is not deemed immediately available to the state performing the execution, or because the method has not been explicitly authorized by state law. Indeed, since *Glossip*, few lower courts have found that a capital prisoner has met the pleading requirement, and in a majority, if not all, of those cases, the finding was overturned on appeal. Yet the availability requirement cannot be limited to those methods that

a state has already authorized by statute or that are immediately available at the time of the analysis, as this interpretation would lead, and has led, to a variety of inconsistent rulings on the availability of alternatives and therefore on the remedies available under the Eighth Amendment.

Amicus, as academic experts, has accumulated broad knowledge of the manner in which capital punishment is carried out throughout the world. In their experience, the implementation of the death penalty in countries throughout the world illustrates that lethal injection is a method that is not widely employed and is viewed as fraught with the substantial risk of pain and suffering, along with related practical difficulties. Accordingly, various other methods of execution are employed globally. Similarly, in the United States, the practice of the various death penalty jurisdictions demonstrates that there is a broad range of "available" methods.[3] As such, the limitations imposed by the lower courts interpreting *Glossip* are unduly restrictive.

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[3] *Amicus* discusses alternative methods of execution because that is what *Glossip* identifies as the framework for analyzing a method-of-execution challenge. By discussing these alternatives, *Amicus* does not specifically endorse any of them as a method of execution.

ARGUMENT

I. STATES CANNOT TRUNCATE THE RIGHTS SECURED BY THE EIGHTH AMENDMENT BECAUSE OF LIMITS IMPOSED BY STATE LAW OR RESOURCES.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."

While this Court has not endeavored "to define with exactness the extent of the constitutional provisions which provides that cruel and unusual punishments shall not be inflicted," it has stated that it is "safe to affirm" that "punishments of torture . . . , and all others in the same line of unnecessary cruelty are forbidden." *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878).

There is an *objective* categorical prohibition on cruel punishment; it is not conditional. The Eighth Amendment prohibits inherently barbaric punishments no matter the circumstance.

Where a state has sanctioned the use of a punishment that is cruel and unusual, state agents cannot erode this Constitutional prohibition due to limits imposed by state law or resources.

A. THERE HAS BEEN A TROUBLING HISTORY OF CRUEL AND UNUSUAL LETHAL INJECTIONS.

Lethal injection has produced the highest proportion of botched executions of all the methods of execution used in the United States since 1900.[4]

The high number of botched executions associated with lethal injection is the result of a number of factors, including individual prisoners' reactions to certain drugs, which can cause them to choke, convulse, and splutter in apparent pain, as well as the difficulties faced by prison staff when attempting to locate the veins of inmates who may be significantly overweight, have certain illnesses, or a history of drug abuse.[5]

The former was the case during the 1989 execution of Stephen McCoy. He reacted so violently to the drugs – gasping, choking, with his back

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[4] AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY, p. 117, 122 (Stanford University Press, 2014). "Botched executions occur when there is a breakdown in, or departure from, the 'protocol' for a particular method of execution. The protocol can be established by the norms, expectations, and advertised virtues of each method or by the government's officially adopted execution guidelines. Botched executions are those involving unanticipated problems or delays that caused, or at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the execution." *Id.* at 5 (internal citations and quotations omitted).

[5] *Id.* at 22; *see also Death Penalty Information Center*, Examples of Post-*Furman* Botched Executions, *https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions*.

arching off the gurney – that one witness even fainted. Afterward, the Texas Attorney General reported that McCoy "seemed to have had a somewhat stronger reaction," and that, "the drugs might have been administered in a heavier dose or more rapidly."[6]

The latter was the case during the 1992 execution of Ricky Ray Rector, who spent nearly an hour waiting for staff to locate his vein in Arkansas's execution chamber, during which time witnesses heard him crying out. Eventually, staff employed the "cut down" method, using a scalpel to cut Rector's arm and locate a vein. He died 19 minutes after the flow of lethal drugs began.[7]

More recently, on September 15, 2009, Ohio death row inmate Romell Broom endured repeated attempts to find a vein in his arms and legs before the state gave up and returned him to his prison cell.[8]

Additionally, when intravenous lines are not properly inserted, drugs can leak into the inmates' soft tissue, rather than reaching the blood stream. This was the case during the 2006 execution of Angel Diaz in Florida, during which the execution team misplaced the catheter. Official witnesses reported that Diaz continued to move for twenty-five minutes after the drugs were injected, grimacing, blinking,

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[6] *Death Penalty Information Center*, Examples of Post-*Furman* Botched Executions, *supra* note 5.

[7] SARAT, *supra* note 4, at 130.

[8] *Death Penalty Information Center*, Examples of Post-*Furman* Botched Executions, *supra* note 5.

and attempting to mouth words. He eventually died thirty-four minutes after the execution began, following a second injection of drugs.[9]

During the infamous botched execution of Clayton Lockett on April 29, 2014, the execution team similarly failed to properly insert the intravenous line and the lethal injection cocktail was pumped into Lockett's soft tissue instead of his vein. According to witnesses, Lockett groaned, writhed, lifted his head and shoulders off the gurney and continued to say words during the 43 minute period that it took him to die.[10]

Another recent factor contributing to the high number of botched lethal injections is the use of experimental drug protocols that have been employed only out of expediency due to restrictions on and difficulty in obtaining the three-drug cocktail approved in *Baze*, which restrictions have resulted in effectively rendering the "three-drug protocol at issue in *Baze*... no longer viable."[11] During the January 2014 execution of Dennis McGuire in Ohio, McGuire

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[9] SARAT, *supra* note 4, at 173.

[10] Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC, Jun. 2015, https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/; Katie Fretland, *Scene at botched Oklahoma execution of Clayton Lockett was 'a bloody mess,'* THE GUARDIAN, Dec. 13, 2014, https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess.

[11] Deborah W. Denno, *The Firing Squad as "a Known and Available Alternative Method of Execution" Post-Glossip*, UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM, Aug. 9, 2016, at 751.

gasped for air, snorted, heaved, and clenched his fists for the approximately twenty-five minutes it took for the hydromorphone and midazolam to take effect. Similarly, during the July 2014 execution of Joseph R. Wood in Arizona, after the chemicals midazolam and hydromorphone were injected, Wood gasped repeatedly for nearly two hours before he was pronounced dead.[12]

In addition to the risks inherent to lethal injection, some death row inmates – such as the Petitioner – have distinctive anatomy or medical conditions that create additional risks that the execution will go awry. Alabama death row inmate Doyle Lee Hamm currently suffers from terminal cancer and enlarged lymph nodes, which have rendered his veins inaccessible. During his scheduled execution on February 22, 2018, Mr. Hamm endured repeated attempts to find a vein in his ankles, lower legs, and groin over a two hour period before the state gave up and returned him to his prison cell.[13]

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[12] *Death Penalty Information Center*, Examples of Post-*Furman* Botched Executions, *supra* note 5.

[13] Tom Batchelor, *Doyle Lee Hamm execution: Repeated jabbing of death row inmate in attempted lethal injection amounts to torture, says lawyer*, THE INDEPENDENT, Feb. 26, 2018, https://www.independent.co.uk/news/world/americas/doyle-lee-hamm-execution-alabama-death-row-lethal-injection-torture-lawyer-latest-a8229241.html.

B. IF STATES CAN PRE-DEFINE WHAT METHODS OF EXECUTION ARE "AVAILABLE," THEN ANY CRUELTY IS INSULATED FROM REVIEW.

To challenge a "cruel and unusual" method of execution, a capital prisoner must demonstrate that the state's proposed method of execution presents both a "substantial risk of serious harm" and an "objectively intolerable risk of harm." *Farmer v. Brennan*, 511 U.S. 825, 842, 846 (1994).

In *Baze v. Rees*, 553 U.S. 35 (2008), this Court held that in order to succeed on an Eighth Amendment challenge against a method of execution, a petitioner must establish that the method of execution proposed by the state is "sure or very likely to cause serious illness and needless suffering," gives rise to "sufficiently imminent dangers" (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)), and that such risk of severe pain "is substantial when compared to the known and available alternatives." *Id.* at 50, 61. A petitioner must also identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Id.* at 51.

Expanding on *Baze*, this Court in *Glossip v. Gross*, 135 S.Ct. 2726 (2015) laid out a two-prong test. According to *Glossip*, to succeed on an Eighth Amendment method-of-execution claim, a petitioner must plead and prove (1) a risk of severe pain and (2) the availability of a "feasible, readily implemented" alternative that "significantly reduce[s] a substantial risk of severe pain." *Id.* at 2737 (quoting *Baze*, 553

U.S. at 51–52). To satisfy the first prong, the petitioner must demonstrate that:

> the method presents a risk that is "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently *imminent* dangers .... [T]here must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment."

Id. (quoting *Baze*, 553 U.S. at 50, in turn citing *Helling v. McKinney*, 509 U.S. at 33–35; *Farmer v. Brennan*, 511 U.S. at 846, n.9) (emphasis added). In order to satisfy the second prong, a petitioner must plead and prove that there is a "known and available" alternative method of execution that is "feasible, readily implemented" and that "significantly reduce[s] a substantial risk of severe pain." *Id.* at 2737-38.

Unfortunately, *Glossip* "provided little guidance as to when an alternative method of execution is 'available.'" *McGehee v. Hutchinson*, 854 F.3d 488, 500 (8th Cir. 2017) (Kelly, J., dissenting). As a result, lower courts addressing the "known and available" requirement since *Glossip* have inconsistently – and incorrectly – interpreted *Glossip*'s holding.

For instance, the Eighth Circuit has taken the position that while an alternative method need not "be authorized by statute or ready to use

immediately," "the State must have access to the alternative and be able to carry out the alternative method relatively easily and reasonably quickly." *McGehee*, 854 F.3d at 493, *cert. denied*, 137 S. Ct. 1275 (2017). Under this standard, it has rejected known methods of execution based on their lack of an extensive history of use, as well as the State's failure to obtain the proposed drugs years prior, deeming them unlikely to emerge as more than a "slightly or marginally safer alternative" as a result. *See id.* at 493. At the same time, the Eighth Circuit also rejected the firing squad—one of the nation's oldest and easily performed forms of execution—as an alternative, determining it to not be "readily implemented." *Id.* at 494.

Similarly, in *Johnson v. Lombardi*, 2015 WL 6501083 (W.D. Mo. Oct. 27, 2015), *cert. denied*, 136 S.Ct. 601 (2015), the District Court for the Western District of Missouri rejected execution by lethal gas as an alternative method. It held that although legal gas was provided for under state statute, the petitioner "never explain[ed] how execution by lethal gas is feasible or could be readily implemented" because he did not assert that the "State has a working gas chamber or all the supplies necessary to operate such a chamber." *Id.* at *3 (citing Mo. Rev. Stat. § 546.720.1). According to the Western District of Missouri, "feasibility asks whether the alternative method is 'capable of being done, executed, or effected'" and "readiness of implementation asks whether the alternative method of execution can be used promptly, efficiently, or without delay." *Id.* The court held, in concluding that the petitioner was unable to prevail on the merits, that "simply because Missouri law *authorizes* the use of lethal gas does not

mean the state is anywhere near prepared to actually *use* lethal gas for executions." *Id.* (emphasis in original).

Various alternative means of execution have likewise been proposed by petitioners and rejected by other courts that have concluded that those methods could not be obtained or implemented by the state in a sufficiently prompt manner. The dilemma posed in these cases is that there are alternative methods of execution "known and available" but perhaps not in the possession or control of the particular state at the immediate time and location of the challenge. *See, e.g., Kelley v. Johnson*, 2016 Ark. 268 (2016) (denying proposed alternative drugs because the inmate's contention that they were "generally available on the market" failed to address whether the state was able to obtain them; further rejecting the firing squad as an alternative on the basis that "reciting bare allegations" that the state possessed "firearms, bullets, and personnel at its disposal to carry out an execution" was insufficient to show that a firing squad was readily available); *Arthur v. Dunn*, 2016 WL 1551475 (M.D. Ala. April 15, 2016) (finding that compounded pentobarbital was not readily available and stating that "[p]roof that another state procured it, that with effort it can be compounded . . ., and indications on the internet that a supplier offers to sell the active ingredients, do not prove a feasible and readily available product. At best, it proves a 'maybe.'"); *Brooks v. Warden*, 810 F.3d 812 (11th Cir. 2016) (rejecting three proposed alternative methods of execution, including midazolam alone, on the basis that although it was "undisputed" that midazolam was available to Alabama, the protocol had never been used

previously, there was still uncertainty regarding the "ceiling effect" of the drug, and thus it could not be readily implemented).

In considering alternatives to lethal injection by a particular combination of drugs, some courts have relied on the potential difficulty of obtaining proposed alternative drugs, despite properly recognizing that it "need not have the drugs on hand." *In re Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017) (overturning the district court's finding that inmates had met the "available" and "readily implemented" requirement, stating the district court was "seriously mistaken as to what 'available' and 'readily implemented' mean"; finding the proposed alternative method unavailable because Ohio was required to receive an import license from the Drug Enforcement Administration and Ohio could not be certain whether the license would be approved or when they would receive a decision, and that "for the standard to have practical meaning, the state should be able to obtain the drugs with ordinary transactional effort"); *see also*, *Grayson v. Dunn*, 156 F. Supp. 3d 1340 (M.D. Ala. 2015) (denying the proposed alternative, in part, because the capital inmate had only plead that the proposed single-drug protocol alternatives may be available to other states, which did not indicate that they were available to Alabama); *Jones v. Kelley*, 854 F.3d 1009 (8th Cir. 2017) (holding that the possibility that Arkansas could acquire pentobarbital was too speculative since the state had made at least three unsuccessful attempts to do so two years earlier).

The same conclusion has been reached even where a state had taken key steps in acquiring the

drug and the state's own expert testified that "he believed [the alternative drug] could be obtained." *In re Ohio Execution Protocol*, 860 F.3d at 899 (Moore, J., dissenting).

Additionally, numerous federal courts have held that if the method of execution is not already statutorily authorized, it is not "available." *See Kelley v. Johnson*, 2016 Ark. 268 (because "[e]xecution by firing squad [was] not identified in the statute as an approved means of carrying out a sentence of death," the court concluded that "it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution.") (citing Ark. Code. Ann. § 5–4–617); *Arthur v. Dunn*, 2016 WL 3912038, at *2 n.5 (M.D. Ala. July 19, 2016) ("A firing squad is not a legal method of execution in Alabama."); *Boyd v. Myers*, 2015 WL 5852948, at *4 (M.D. Ala. Oct. 7, 2015) (holding that Boyd failed to meet his burden of pleading a feasible and readily available alternative because he "identifie[d] a firing squad and hanging as two feasible and readily available alternatives . . . [b]ut those two methods are not permitted by statute in Alabama," and as such implement the proposed alternative without lethal injection and electrocution first being declared unconstitutional would require a statutory amendment; further finding that the fact that other states provide for those two methods "does not make them feasible or readily available for use by Alabama."); *Bible v. Davis*, 2018 WL 3068804, at *9 (S.D. Tex. June 21, 2018), *aff'd*, 2018 WL 3156840 (5th Cir. June 26, 2018) (holding that Bible failed to prove that either firing squad or nitrogen hypoxia were feasible or readily implemented because "Texas law and protocol allow for the State to use only one

method of execution: lethal injection" and "switching to either of Bible's proposed alternatives would require new statutory law and the formulation of new protocol."). This gives rise to the anomalous result that hanging, for example, is not "known and available" in Arkansas, Alabama, and Maryland, but is specifically authorized by statute in Mississippi, Oklahoma, and Utah and used around the world by more countries than any other method of execution.[14]

By allowing a potentially cruel and unusual punishment to only be successfully challenged if that state statutorily provides an alternative and/or has kept its equipment in good operational order, states effectively have veto power over capital inmates' Eighth Amendment rights. This simply cannot be the law.

Indeed, allowing each state to determine the available methods of execution in this way would balkanize Eighth Amendment jurisprudence, leading to arbitrary results. One state might authorize a method of execution that was gratuitously cruel, yet it would be insulated from any review. Such a decision might be improvised by the warden of a prison[15] or the

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[14] Ironically, in some circumstances courts have shown a willingness to depart from statutorily authorized methods when the state proposes the alternative method, yet rarely when the prisoner proposes it. *See, e.g., Jordan v. Fisher*, 823 F.3d 805 (5th Cir. 2016) (holding that Mississippi's deviation from its statutory method of execution did not violate prisoners' due process rights because it would not "'impose atypical and significant hardship' on the prisoners beyond the ordinary for those facing execution" or "shock the conscience" in a manner that would to entitle them to substantive enforcement of the statute).

[15] *See* South Dakota (SDCL 23A-27A-32) and Georgia (OCGA § 50-13-4).

director of the department of corrections,[16] without more. Another state might list any number of different methods,[17] or allow the use of a certain method only in the limited circumstance that the first method was found to be unconstitutional[18] – which would be logically impossible if the primary method was deemed under state law to be the only possible method. Hence, in medical circumstances such as those confronting the Petitioner here, a method of execution "known" and recognized globally could be denied to the prisoner simply because it was not listed on the state statute, and even those available by state statute could be denied simply because that method has fallen into disuse, even if it would alleviate unconstitutional suffering.

Such an interpretation is not only illogical, but it runs counter to the holdings in *Glossip* and *Baze*, neither of which foreclosed alternative methods of execution beyond state statute or immediate availability. The majority in *Glossip* indicated that despite the fact that at the time Oklahoma's death penalty law only permitted the use of "drug or drugs," Petitioners could have (but had failed to) plead alternative methods of execution. There, this Court held that Petitioners "had not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain[, n]or have they

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[16] *See e.g.*, South Carolina.

[17] *See* Tennessee, where the electric chair may be used if the drugs for lethal injection are not available.

[18] *See* Oklahoma, Sta. Ann. 22, § 1014, authorizing lethal injection, or as alternatives nitrogen hypoxia, electrocution, or the firing squad respectively, depending on whether the preceding method is found unconstitutional.

shown a risk of pain so great that *other acceptable, available methods must be used.*" 135 S. Ct. at 2738 (emphasis added). Similarly, the plurality in *Baze* held that "[i]f a State refuses to adopt [a proposed] alternative in the face of . . . documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." 553 U.S. at 52. This Court clearly did not intend to limit prisoners' ability to propose alternative methods of execution to those provided by a respective state's statute or available on-hand.

Indeed, if a state statute could impose such limitations on the available methods of execution, "even if a prisoner can prove that the State plans to kill him in an intolerably cruel manner, and even if he can prove that there is a feasible alternative, all a State has to do to execute him through an unconstitutional method is to pass a statute declining to authorize any alternative method." *Arthur v. Dunn*, 137 S. Ct. 725, 729 *reh'g denied*, 137 S. Ct. 1838 (2017) (SOTOMAYOR, dissenting from denial of certiorari). That is certainly not what the Eighth Amendment, the Constitution of the United States, or this Court's precedent provides. Without question, "state laws respecting crimes, punishments, and criminal procedure are . . . subject to the overriding provisions of the United States Constitution." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991)).

Moreover, such interpretations run counter to the principle of uniformity in constitutional interpretation required throughout the country. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 347–348

(1816) (emphasizing the "'necessity of uniformity' in constitutional interpretation 'throughout the whole United States, upon all subjects within the purview of the constitution.'" (emphasis deleted)).

Glossip's threshold requirement of identifying a known and readily implemented method is being applied in a constricted manner to limit those alternatives to those already prescribed in a state statute (and sometimes not even those) or to those execution methods for which the necessary elements are in that states' "medicine cabinet" at the time. That is not what this Court's precedent requires, nor is such restrictive reading permitted by the Constitution.

II. THE EXPERIENCE OF COUNTRIES AROUND THE WORLD HELPS TO INFORM WHAT METHODS OF EXECUTION ARE "AVAILABLE" AND ILLUSTRATES HOW LETHAL INJECTION IS AN OUTLIER IN WORLD PRACTICE.

Although *Amicus* does not endorse any method of execution, *Amicus* has developed an academic expertise in the manner in which the death penalty is carried out around the world, and this helps inform what is a "feasible, readily implemented alternative procedure."

A survey of execution methods across the world suggests that lethal injection is an anomaly, rather than the norm. Of the ninety-three countries that have laws authorizing the death penalty, the overwhelming majority – 93.5% – have decided to use

execution methods other than lethal injection.[19] Just the United States and five other countries (6.5%) provide for lethal injection as a method of execution, either in law or practice.[20] Only five countries have used this method in the past seven years, and one, Taiwan, has now abandoned this method in favor of the firing squad.[21] Several other countries that implement the death penalty have actively rejected lethal injection, opting instead for alternative methods of execution, like hanging.[22]

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[19] *Cornell Law School, Cornell Center on the Death Penalty Worldwide*, Death Penalty Database, http://www.deathpenaltyworldwide.org/search.cfm.

[20] China, Guatemala, Taiwan, Thailand, and Vietnam.

[21] *Amnesty International*, Death Sentences and Executions, 2012, 2013, 2014, 2015, 2016; Harriet Agerholm, *Thailand Uses Lethal Injection to Execute First Prisoner in Nearly a Decade*, THE INDEPENDENT, Jun. 19, 2018, https://www.independent.co.uk/news/world/asia/thailand-execution-death-penalty-lethal-injection-amnesty-international-a8405711.html.

[22] For example, India, the Maldives, and Papua New Guinea have specifically opted to not use lethal injection as a method of execution. *See* Writ Petition (CRL.) (PIL) No. 145 of 2017, Counter Affidavit on Behalf of the Respondent, para. 14 (i) and (ii); *Maldives: Halt First Execution in More Than 60 Years*, AMNESTY INTERNATIONAL, Jul. 20, 2017, https://www.amnesty.org/en/latest/news/2017/07/maldives-halt-first-execution-in-more-than-60-years/; Mohamed Visham, *Maldives Amends Capital Punishment Law to Opt for Death by Hanging*, THE EDITION, Jun. 17, 2016, https://edition.mv/news/148; Maldives to Execute *Death Row Inmates by Hanging*, *MALDIVES INDEPENDENT*, Jun. 19, 2016, https://maldivesindependent.com/politics/maldives-to-execute-death-row-inmates-by-hanging-124872; *Papa New Guinea Rules Out Lethal Injection in Hunt for Execution Method*, DEATH PENALTY NEWS, Oct. 14, 2014, http://deathpenaltynews.blogspot.co.uk/2014/10/papua-new-guinea-rules-out-lethal.html.

Further evidence of the increasing disfavor of lethal injection may be gleaned from countries that have abolished the death penalty. For example, in the United Kingdom, the medical community resisted efforts to introduce lethal injection based on a "lack of 'reasonable certainty' that lethal injection executions could be carried out 'quickly, painlessly and decently.'"[23] Great Britain's Royal Commission on Capital Punishment ultimately rejected lethal injection, in part because it could not be used on individuals with certain "physical abnormalities."[24]

Given how few countries use lethal injection as a method of execution, it cannot be that lethal injection is the only "available" method of execution. Indeed, international practice reflects a number of readily available and regularly used methods of execution.

For example, some 62.36% of the countries around the world that implement the death penalty provide for hanging as a method of execution in their statutes. Of the thirty-two countries that actually carried out executions between 2013 and 2017, eighteen (56%) used hanging.[25]

The firing squad is the second most common method of execution internationally, and is provided

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[23] SARAT, *supra* note 4, at 177.

[24] See ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-53, REPORT 258–280.

[25] See *Cornell Law School, Cornell Center on the Death Penalty Worldwide*, Death Penalty Database, http://www.deathpenaltyworldwide.org/search.cfm; *Amnesty International*, Death Sentences and Executions, 2013, 2014, 2015, 2016, 2017.

for in law by 53.76% of countries whose laws provide for capital punishment. Of the thirty-two countries that carried out executions between 2013 and 2017, fourteen (44%) used the firing squad.[26] In addition to its widespread use, the firing squad – like hanging – is carried out using procedures that are relatively simple and consistent across jurisdictions, suggesting that it is a well-established method of execution worldwide.[27]

To be clear, *Amicus* does not claim that the United States is somehow bound to use other methods because international practice shows them to be more prevalent. Rather, *Amicus* simply suggests that the argument that such methods (hanging and the firing squad) are not "known and available" is implausible given how very well-known and readily available both methods are in international practice.

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[26] *Id.* To clarify the numbers, two international jurisdictions have used both lethal injection and the firing squad; two have used both hanging and the firing squad.

[27] Typically, prisoners are executed by a group of people, only some of whom have loaded rifles. *See* Kate Lamb, *Death Penalty in Indonesia: An Executioner's Story*, THE GUARDIAN, Mar. 5, 2015, https://www.theguardian.com/world/2015/mar/06/death-penalty-in-indonesia-an-executioners-story; *Cornell Center on the Death Penalty Worldwide, Cornell Law School*, Indonesia, http://www.deathpenaltyworldwide.org/country-search-post.cfm?keyword=shot+to+the+head (last visited Jul. 20, 2018); Salam Al Amir, *Moosa Killer Begged for Forgiveness at Execution*, THE NATIONAL, https://www.thenational.ae/uae/moosa-killer-begged-for-forgiveness-at-execution-1.377015.

III. THE METHODS OF EXECUTION USED IN THE UNITED STATES FURTHER INFORM WHAT METHODS ARE "AVAILABLE" AND ILLUSTRATE A BROAD RANGE OF ALTERNATIVES.

As suggested by the international experience, various alternatives to lethal injection are readily available in the United States.

Several states already recognize the issues with lethal injection that make it a global anomaly. For instance, earlier this year, Oklahoma opted to include nitrogen hypoxia as a potential method of execution. Additionally, Alabama now allows prisoners to affirmatively choose either nitrogen hypoxia or electrocution in place of lethal injection. At the very least, these recent developments demonstrate that there certainly are "known" and "available" alternatives for states to choose aside from lethal injection. An overview and the history of such methods known and available to the United States is examined below.

Firing Squad: The firing squad is one of the oldest known methods of execution in the United States[28] and has been used since before the country's founding, with the first documented firing squad execution taking place in Virginia in 1608, followed by 144 further executions since that date (thirty-four of which have taken place since 1900).[29] Utah ended the nine-year moratorium in capital punishment in

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[28] Denno, *supra* note 11, at 778.

[29] *Id.*

the United States in 1977 by executing inmate Gary Gilmore by firing squad.[30] The most recent firing squad execution to take place in the United States was carried out in Utah in 2010, in the same room used for lethal injection executions.[31]

Currently, Mississippi, Oklahoma, and Utah provide for execution by firing squad in their statutes,[32] and at least three of Utah's nine death row inmates are scheduled to die by the firing squad in coming years, having elected to do so under an earlier version of the Utah statute.[33] Thus, the firing squad is a readily available method of execution in the United States.[34]

Hanging: Hanging is one of the oldest known methods of execution in the United States.[35] By

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[30] *Id.* at 757.

[31] *Id.* at 782.

[32] Utah Code Ann. § 77-18-5.5; Oklahoma H.B. 1879 at § 1014 (D); Miss. Code Ann. § 99-19-51.

[33] Ben Winslow, *The Men on Utah's Death Row and How They Want to Die*, FOX 13 NOW, Feb. 12, 2016, http://fox13now.com/2016/02/12/the-men-on-utahs-death-row-and-how-they-want-to-die/.

[34] Additionally, in April 2015 South Carolina Rep. Joshua A. Putnam introduced a bill proposing that South Carolina to administer the death penalty by firing squad if lethal injection drugs are not available. In 2017, lawmakers in Alabama introduced legislation to bring back the firing squad. H. 4038, http://www.scstatehouse.gov/sess121_2015-2016/bills/4038.htm; WSFA, AL lawmaker wants to add firing squad to death row options, January 31, 2017, http://www.wsfa.com/story/34392999/al-lawmaker-wants-to-add-firing-squad-to-death-row-options.

[35] Denno, *supra* note 11, at 778.

1853, hanging had become "the nearly universal form of execution in the United States and 48 States once imposed death by this method." *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from denial of certiorari) (internal citation and quotation marks omitted). Until 1890, hanging was the primary means by which capital punishment was carried out.[36] Even after 1890, when hanging was overtaken by electrocution as the preferred method of execution, it remained the second most commonly used method of execution, such that 2,721 inmates were executed using this method between 1900 and the present day.[37]

Today, two states, New Hampshire and Washington, continue to provide for execution by hanging in their state statutes,[38] demonstrating that this remains an available method of execution in the United States.

Other Methods: There are other methods of execution that are available in the United States, even if they are not prevalent in other countries. For example, from 1900 through the present day, electrocution has been the most commonly used method of execution in the United States, with 4,376 executions.[39] Today, Alabama, Arkansas, Florida,

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[36] *A Glance at the 5 Execution Methods Allowed in the US Today and How They Work*, FOX NEWS, May 23, 2014, http://www.foxnews.com/us/2014/05/23/glance-at-5-execution-methods-allowed-in-us-today-and-how-work.html.

[37] SARAT, *supra* note 4, at 177.

[38] N.H. Rev. Stat. § 630:5; Revised Code of Washington, RCW 10.95.180.

[39] SARAT, *supra* note 4, at 177.

Kentucky, Mississippi, Oklahoma, South Carolina, Tennessee, and Virginia retain electrocution in their state statutes, demonstrating that this too remains a known and available method of execution in the United States.[40]

Additionally, lethal gas was first introduced as a method of execution in Nevada in March of 1921 and was first used in February of 1924.[41] At one point, eleven states had adopted lethal gas as a method of execution.[42] Currently, four states – Arizona, California, Missouri, and Wyoming – statutorily authorize the gas chamber as a method of execution. Three states – Alabama, Mississippi, and Oklahoma – authorize nitrogen hypoxia as a method of execution.[43]

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[40] *Death Penalty Information Center*, Methods of Execution, https://deathpenaltyinfo.org/methods-execution.

[41] SARAT, *supra* note 4, at 90, 94–95.

[42] Arizona, Colorado, North Carolina, Wyoming, California, Missouri, Oregon, Mississippi, Maryland and New Mexico. See *Id.* at 96.

[43] *Death Penalty Information Center*, Methods of Execution, https://deathpenaltyinfo.org/methods-execution?scid=8&did=245#al. In March of 2018, Oklahoma became the first state to make nitrogen gas available when lethal injection is not possible. State officials noted that in order to carry out lethal injection executions, they would have to obtain the drugs "illegally," and did not want to buy drugs from "seedy individuals" on "back streets" in order to continue to use it. They also referenced problems with lethal injections in other states, such as the Alabama case of Doyle Lee Hamm, who was "punctured eleven times" over the course of several hours in a prolonged execution that Oklahoma officials described as "inhumane".

Thus, there are various readily available methods of execution. Moreover, history demonstrates that it is not unduly burdensome for states to alter their authorized methods of execution. After all, it was not so long ago – 1977 – that Oklahoma became the first state to authorize lethal injection, and every state that adopted it subsequently merely changed its own rules.

CONCLUSION

For the reasons stated above, *Amicus Curiae* respectfully urges the Court to reverse the lower courts and clarify that the "known and available" requirement for pleading method-of-execution cases mandates neither that the proposed alternative be available on-hand, nor that it be prescribed by state statute.

Respectfully submitted,

Bruce H. Schneider
Counsel of Record
David J. Kahne
Emily L. Kuznick
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038

Counsel for *Amicus Curiae*[44]

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[44] Counsel acknowledge the assistance of Patrick V. Kennedy, a law student.